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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

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In re } Case No. 16-10169-B-13  
Frank Miranda Dores and } DC No. AMM-2  
Mary Anne Souza Dores, }  
Debtors. }

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**MEMORANDUM DECISION ON BUNNETT & COMPANY  
AND ENERGY FEEDS INTERNATIONAL, LLC'S  
MOTION TO DISMISS CASE**

14

**INTRODUCTION**

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“Revenge should have no bounds” muses King Claudius to Laertes as they connive a star-crossed tactical plan for Prince Hamlet's early demise.<sup>1</sup> While successful, their plan resulted in unintended and tragic consequences for most of the principal characters in the famous play. This case illustrates how far two parties' perceived condign for the other's assumed wrongs may go when one party ends up in Bankruptcy Court.

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Here, a former employee of two suppliers of components of dairy cattle nutrition, who left over issues of customer treatment and job related stress, was sued by his former employers for allegedly competing against them. After the employee and his spouse filed this bankruptcy case, the lawsuit was stayed but facts were exposed suggesting the debtors were not candid with the court and creditors.

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<sup>1</sup> William Shakespeare's “Hamlet” Act IV Scene 7.

1        Unfortunately, the debtors' efforts to either be protected from retribution  
2 or execute their own plan for the former employer's comeuppance intersected  
3 with a debtor's disclosure requirements under the Bankruptcy Code and 11  
4 U.S.C. § 1307(c)'s discretionary dismissal "for cause."<sup>2</sup> As discussed in more  
5 detail below, though unstated in § 1307, "bad faith" is "cause" for dismissal. The  
6 court finds bad faith here and dismisses the bankruptcy case as being in the best  
7 interests of creditors.

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## PERTINENT FACTS

10        1. Pre-petition Events:

11        Frank Miranda Dores ("Frank") and Mary Anne Souza Dores ("Mary  
12 Anne") (collectively the "Debtors" or the "Dores") are married.<sup>3</sup> Frank worked  
13 for Bunnett & Company and its related company, Energy Feeds International,  
14 LLC (collectively, "Bunnett"), for eight years until his resignation from both  
15 companies on October 23, 2015.<sup>4</sup> While employed at Bunnett, Frank received a  
16 lucrative salary, in excess of \$300,000 a year. Bunnett distributes nutritional  
17 supplements for dairy cows. Bunnett's former primary supplier for sodium  
18 bicarbonate was Natural Soda, LLC ("Natural Soda"); its former primary supplier  
19 for inert fats was Wawasan Agrolipids, a Malaysian company.<sup>5</sup>

20        When Frank resigned as general manager for both companies on October  
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22        <sup>2</sup> Unless specified otherwise, all chapter and section references are to the  
23 Bankruptcy Code 11 U.S.C. §'s 101-1532, and all "Rule" references are to the Federal  
Rules of Bankruptcy Procedure Rules 1001-9037.

24        <sup>3</sup>The court will refer to the debtors by their first names. Since another witness in  
25 this case, Frank's mother, is also named Mary Dores, she will be referred to as "Mary."  
The court is doing this for ease of reference and no disrespect is intended.

26        <sup>4</sup>Joint statement of undisputed facts (doc. #336 at ¶ 2).

27        <sup>5</sup>*Id.* at ¶ 1.

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1 23, 2015, he claimed he was suffering from stress fostered by policy and  
2 management changes at Bunnett.<sup>6</sup> Both parties concede there is no express  
3 contractual basis preventing Frank from competing with Bunnett. When Frank  
4 resigned, two other sales people also resigned from Bunnett, Ray Gearheart and  
5 John Franklin.<sup>7</sup>

6 Mary Anne is an appraiser. She works in Atwater, California, where  
7 Frank and Mary Anne reside. When Frank resigned from Bunnett, he and Mary  
8 Anne formed a company, FM Ag Enterprises, Inc. (“FM Ag”). Mary Anne  
9 testified that it was not their intention for Frank to work for FM Ag. However,  
10 shortly after he left Bunnett, Frank told Andrew Lott, a hauler Frank worked  
11 with, that his new contact information was FM Ag. In early November 2015, a  
12 subsidiary of Wawasan, Paros Limited (“Paros”), paid FM Ag \$20,000 for a  
13 marketing study purportedly prepared by Mary Anne. Mary Anne does not have  
14 a copy of that study and has never produced it.

15 November 2015 proved a pivotal month. Frank, John Franklin and Ray  
16 Gearheart joined forces in negotiating with Natural Soda for a sales agent  
17 relationship. The three hired the same law firm to represent them in that  
18 negotiation. After final documentation was exchanged, the negotiations were  
19 abruptly aborted. During November and the following months, Frank had either  
20 received phone calls from or had contacted various suppliers and customers of  
21 Bunnett, including Mission Ag, Dewco, OCI International, Inc. (“OCI”), and  
22 Wawasan. Frank arranged relationships with Wawasan and his other contacts,  
23 including dairymen, over the period of a few months. Wawasan’s primary  
24 contact in America was through an American subsidiary, Agrofin. Wei Su was

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26 <sup>6</sup>Frank applied for worker’s compensation because of stress-related issues.

27 <sup>7</sup>Bunnett also presented testimony that Frank compromised his company  
28 computer’s hard drive and removed approximately 1,000 “files” from the memory  
before returning the computer. His “company’s iPad” was returned with factory  
settings.

1 the primary contact at Agrofin.

2 Also in November 2015, Frank withdrew his worker's compensation  
3 claim. With counsel's assistance, he pursued a claim for disability and began  
4 receiving disability payments. The *bona fides* of the disability claim would prove  
5 to be a substantial issue in the bankruptcy case.

6 In late November 2015, Bunnett sued Frank, Natural Soda and others in  
7 the Texas State Court for various business torts and trade infringement. The  
8 Texas State Court issued a temporary restraining order restricting Frank's  
9 contacts with his former business associates, customers and suppliers. In  
10 December 2015, Frank removed the Texas litigation to the Federal District Court  
11 in the Western District of Texas. At this time, and until early January 2016,  
12 Frank "disappeared" and became "nonexistent."<sup>8</sup>

13 In the beginning of January 2016, Ray Gearheart was contacted by  
14 Wawasan to discuss a way monies could be paid to Frank so that he could have  
15 funds to defray his mounting legal costs and living expenses. Frank testified that  
16 Wawasan's generosity was possibly motivated by their desire for Frank to work  
17 for them "at some moment in the future." In mid-January 2016, Frank and Ray  
18 Gearheart communicated. Ray testified that the Wawasan payments would  
19 amount to \$40,000 which would be payable at \$20,000 in January 2016 with the  
20 remaining \$20,000 to be paid "sometime later." Frank gave Ray the names of  
21 friends and family members and provided contact information where the money

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23 <sup>8</sup>The parties have stipulated to the admission of testimony of certain witnesses  
24 by deposition instead of trial testimony. Some of these depositions were taken in the  
25 Texas lawsuits. Ray Gearheart was originally to testify at trial. However, Bunnett was  
26 unsuccessful in serving a subpoena. Bunnett and Dores stipulated that Bunnett had not  
27 been able to procure Ray Gearheart's live testimony by any reasonable means and  
28 therefore under Federal Rule of Evidence 804(a), the court deemed Ray Gearheart  
"unavailable." The deposition testimony of Wei Su, Todd Gearheart, Ray Gearheart's  
son, Brian D'Ewart of Dewco, John Franklin and Andrew Lott was allowed by  
stipulation of the parties. While the court is therefore unable to assess credibility of  
those witnesses, a risk both parties are evidently willing to take, the court has reviewed  
the deposition testimony highlighted by both parties. The reference above is to the  
transcript of Wei Su's deposition. 40:13-25; 61:7-62:7.

1 could be transmitted. The names Ray Gearheart received were Marcio Relva,  
2 Frank's brother-in-law, Angel Hernandez, an acquaintance and contractor, and  
3 Teresa Miranda, Frank's grandmother. Teresa Miranda was being cared for by  
4 Mary Dores, Frank's mother. Frank's and Mary Anne's testimony was that they  
5 disclaimed any interest in the proposed payments then and always.

6 Meanwhile, the Federal District Court in Texas also issued a temporary  
7 restraining order which was set to expire at the beginning of February 2016. As  
8 did the restraining order issued by the Texas State Court, the Federal District  
9 Court order essentially prevented Frank from competing with Bunnett until the  
10 litigation could be resolved.

11 **2. The Bankruptcy Filing and Coincident Events:**

12 Frank and Mary Anne filed this chapter 13 bankruptcy case on January 22,  
13 2016. Both Frank and Mary Anne signed the petition, schedules and statement of  
14 affairs. They also signed declarations regarding their projected disposable  
15 income. Both declarations stated that Frank was disabled and unable to work and  
16 would be unable to receive the same salary as he had in the previous six months.  
17 Neither the schedules nor the declarations mention anything about the \$40,000  
18 payable by Wawasan.

19 Ray Gearheart arranged for his son Todd to receive funds from Wawasan  
20 and Todd then forwarded the funds to the persons Frank identified. According to  
21 the testimony, Mr. Relva, Mr. Hernandez, and Mary Dores were all contacted by  
22 Frank and alerted that monies for Frank and Mary Anne's benefit could soon  
23 come to them in the form of checks. In fact, Todd Gearheart received \$20,000  
24 from Wawasan on January 26, 2016, and the next day sent \$5,000 to Mario Relva  
25 and \$15,000 to Angel Hernandez. Wawasan sent the other \$20,000 about two  
26 months later, in March 2016. Ten Thousand dollars (\$10,000) of the second  
27 payment was given to Angel Hernandez and the remaining \$10,000 to Teresa

1 Miranda; because she was in Mary's care, Mary cashed the check and handled the  
2 money.

3 Frank and Mary Anne had their meeting of creditors under U.S.C. §  
4 341(a) of the Bankruptcy Code on March 8, 2016. No mention was made of the  
5 payments from Wawasan.<sup>9</sup>

6 Immediately after the bankruptcy was filed, Frank and Mary Anne filed a  
7 motion for contempt against Bunnett for pursuing discovery in the Texas Federal  
8 Court action violating the automatic stay (DC No. FW-1, Doc. #7). Bunnett filed  
9 a countermotion for stay relief and to confirm the absence of the automatic stay  
10 of § 362 (DC No. AMM-1, Doc. #31) on February 9, 2016. Those motions have  
11 not been heard.

12 Frank and Mary Anne filed amended schedules on March 23, 2016 (Doc.  
13 #87). The amendments increased their tax claims (Frank and Mary Anne's 2015  
14 taxes had been liquidated) and added taxes due to the Franchise Tax Board. The  
15 amendments also listed various changes in their Official Form 122C-2 regarding  
16 their projected income. (Doc. #88.) The \$40,000 payments from Wawasan were  
17 not disclosed.

18 3. Events Following the Bankruptcy Filing:

19 On May 23, 2016, Frank and Mary Anne's chapter 13 plan was confirmed  
20 without objection. The plan provides for monthly payments to the chapter 13  
21 trustee of \$1,205 for sixty (60) months. Frank and Mary Anne propose to  
22 surrender their "investment" real property. They propose to continue making  
23 their house payments and payments on two timeshares owned by a trust. They  
24 will continue to make payments on a 2016 Ford Lariat and on a 2013 Lincoln  
25 Navigator. The order confirming plan does provide that the case will be set for

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26  
27 <sup>9</sup>Exhibit 3.  
28

1 annual review of the Dores' income by the trustee.

2 Bunnett filed no proof of claim in the bankruptcy case. Bunnett also did  
3 not object to confirmation of the chapter 13 plan.

4 Following scheduling conferences on the motion for contempt and  
5 countermotion for stay relief, Bunnett and the Dores negotiated a proposed  
6 settlement of their differences. During the course of that negotiation and in the  
7 context of the continuing Texas litigation, Bunnett discovered the previously  
8 undisclosed \$40,000 in Wawasan payments. When Bunnett confronted the  
9 Debtors with this information, Frank and Mary Anne signed two additional  
10 declarations which stated in part that they did not receive the funds directly nor  
11 receive any benefit from the funds. However, other testimony was that a portion  
12 of the money was used to pay an overdue school tuition bill for Frank and Mary  
13 Anne's children, for payment on a timeshare, and for a payment on a storage  
14 facility. The settlement was not finalized or approved. Twenty-thousand dollars  
15 (\$20,000) of the \$40,000 in Wawasan payments was returned by Hernandez and  
16 Relva to Frank and Mary Anne's counsel where it was deposited in counsel's  
17 trust account. The remaining \$20,000 is still missing but at least part of it was  
18 spent by Hernandez and Mary Dores.

19 Bunnett's founder, Bill Bunnett, testified that Bunnett has filed another  
20 lawsuit alleging RICO violations and other claims against numerous defendants,  
21 including some of the recipients of the Wawasan payments. Mr. Bunnett testified  
22 that Frank would be added as a defendant if the bankruptcy case was dismissed.  
23 On August 17, 2016, this motion to dismiss was filed (the "Motion").<sup>10</sup>

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27 <sup>10</sup>Doc. #161.

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## JURISDICTION

2 This court has jurisdiction of this contested matter by reference from the  
3 United States District Court for the Eastern District of California pursuant to 28  
4 U.S.C. § 157(b)(2)(A). The district court has jurisdiction pursuant to 28 U.S.C. §  
5 1334(b) in that this is a civil proceeding arising under Title 11 of the United  
6 States Bankruptcy Code. This is a “core” proceeding pursuant to 28 U.S.C. §  
7 157(b)(2)(A) and (O). Bunnett and the Debtors agree that this court can hear and  
8 determine this matter if it is ever determined to be a matter that cannot be heard  
9 and determined of right by a bankruptcy judge under 28 U.S.C. §  
10 157(c)(2).<sup>11</sup>

## CONTENTIONS OF THE PARTIES

13       Bunnell contends that the failure of the Dores to disclose Frank's pre- and  
14 post-petition continued contacts with those involved in the dairy feed industry  
15 after leaving Bunnell's employment, the establishment of FM Ag as a facade to  
16 veil future payments for Frank, and failure to disclose the \$40,000 in Wawasan  
17 payments, establish that this chapter 13 case was filed in bad faith and should be  
18 dismissed with prejudice. Bunnell points to the various documentary and  
19 testimonial evidence contradicting Frank's and Mary Anne's version of events  
20 and their continued insistence that they did not receive any benefit from the  
21 \$40,000 as indicative of bad faith and supports dismissal with prejudice.

22 The Dores contend that a review of the totality of the circumstances, as  
23 required by controlling Ninth Circuit authority in deciding a motion to dismiss,  
24 shows that Bennett has not met its burden of establishing “cause” for dismissal  
25 on the grounds of bad faith. The Dores rely on their subjective belief regarding

<sup>11</sup>Final pre-trial order (doc. #361).

1 the ownership and use of the funds paid by Wawasan and emphasize the fact that  
2 no contract prevented Frank from entering into relationships competitive with  
3 Bunnett. The Dores also contend that the court should take into account the  
4 debilitating stress Frank suffered at the hands of Bunnett. Alternatively, the  
5 Debtors contend that, even if the court is inclined to dismiss Frank from the  
6 bankruptcy case, Mary Anne should be permitted to continue the chapter 13 case  
7 until she receives a discharge.

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9

## DISCUSSION

10 1. Legal Framework, Burden and Standard of Proof.

11 Section 1307(c) sets forth a non exclusive list of factors that constitute  
12 “cause” for conversion or dismissal. *Schlegel v. Billingslea, Jr. (In re Schlegel)*,  
13 526 B.R. 333, 338 (9th Cir. BAP 2015). Although not specifically listed, bad  
14 faith is a “cause” for dismissal under § 1307(c). *Eisen v. Curry (In re Eisen)*, 14  
15 F.3d 469, 470 (9th Cir. 1994). In this Circuit, bankruptcy courts make good faith  
16 determinations on a case-by-case basis, after considering the totality of the  
17 circumstances. *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir.  
18 1999). Debtors may be found to have either filed the bankruptcy petition or a  
19 chapter 13 plan in bad faith. *Ellsworth v. Lifescape Medical Associates, P.C. (In  
20 re Ellsworth)*, 455 B.R. 904, 914 (9th Cir. BAP 2011). Even though the court  
21 may have found impliedly or explicitly that a chapter 13 plan was proposed in  
22 “good faith,” the court can review that finding post-confirmation if new  
23 information comes to light. *In re Luxford*, 368 B.R. 63 (Bankr. D.Montana  
24 2007). Further, a creditor need not file a proof of claim to have standing to move  
25 to dismiss for cause. *de la Salle v. U.S. Bank, N.A. (In re de la Salle)*, 461 B.R.  
26 593, 604 (9th Cir. BAP 2011).

27 //

28

1       The parties in this case agree that the “factors” set forth in *Leavitt* are the  
2 framework for the court’s analysis. The so-called “*Leavitt* factors” are: (1)  
3 whether the debtor misrepresented facts in his petition or plan, unfairly  
4 manipulated the Bankruptcy Code, or otherwise filed his chapter 13 petition in an  
5 inequitable manner; (2) the debtor’s history of filings and dismissals; (3) whether  
6 the debtor only intended to defeat state court litigation; and (4) whether egregious  
7 behavior is present. *In re Leavitt* 171 F.3d at 1224. In addition, a “court must  
8 make its good faith determination in light of all militating factors.” *Ho v. Dowell*  
9 (*In re Ho*), 274 B.R. 867, 876 (9th Cir. BAP 2002) (citing *Goeb v. Heid (In re*  
10 *Goeb*), 675 F.2d 1386, 1390 (9th Cir. 1982)). While the application of the  
11 *Leavitt* factors inform the process, “the court is not obligated to count the four  
12 *Leavitt* factors as though they present some sort of a box-score but rather is to  
13 consider them all and weigh them in judging the ‘totality of the circumstances.’”  
14 *In re Lehr*, 479 B.R. 90, 98 (Bank. N.D.Cal. 2012). “The bankruptcy court is not  
15 required to find that each [*Leavitt*] factor is satisfied or even to weigh each factor  
16 equally.” *Khan v. Curry (In re Khan)*, 523 B.R. 175, 185 (9th Cir. BAP 2014).  
17 Rather, “[t]he *Leavitt* factors are simply tools that the bankruptcy court employs  
18 in considering the totality of the circumstances.” *Id.*

19       Before looking at the case through the prism of the *Leavitt* factors, the  
20 Dores have asked the court to require the movants to provide “clear and  
21 convincing” evidence in support of the Motion. The court declines to do so. The  
22 “preponderance of the evidence” standard has been applied by courts in this  
23 Circuit to motions to dismiss under chapter 7, *Aspen Skiing Company v. Cherrett*  
24 (*In re Cherrett*), 523 B.R. 660, 669 (9th Cir. BAP 2014) and in assessing motions  
25 to dismiss under chapter 11. *In re Sullivan*, 522 B.R. 604, 614 (9th Cir. BAP  
26 2014). In an unpublished decision, a bankruptcy court in Idaho has applied the  
27 “preponderance of the evidence” standard in a chapter 13 motion to dismiss. *In*

1 *re Kieffer*, 2015 WL 7450087 at \*5 (Bankr. D.Idaho, November 23, 2015).

2 The debtors cite *In re Mark*, 336 B.R. 260, 265 (Bankr. D.Maryland 2006)  
3 and the Supreme Court in *Addington v. Texas*, 441, U.S. 418, 424 (1979) by  
4 analogy to support their contention that a “clear and convincing” standard of  
5 proof applies to the court’s determination that the debtors’ chapter 13 case was  
6 not filed in good faith. The argument is misplaced. The court in *Mark* was  
7 deciding a motion under § 362(c)(3) to extend the automatic stay where the  
8 *presumption of bad faith* had arisen. Section 362(c)(3)(C) specifies that “clear  
9 and convincing” is the standard of proof the debtor bears in rebutting the  
10 statutory *presumption* of bad faith. The *Addington* case dealt with the standard of  
11 proof needed to civilly commit someone involuntarily to a state mental hospital.  
12 Neither case stands for the proposition that the “clear and convincing” standard  
13 should supplant “preponderance of the evidence” in assessing a motion to dismiss  
14 under § 1307. This court will apply the “preponderance of the evidence”  
15 standard.<sup>12</sup>

16 The burden of proof squarely lies with the movant in this case, Bunnett.  
17 The determination of whether a debtor filed a petition or plan in bad faith and  
18 that dismissal for cause is justified is left to the sound discretion of the  
19 bankruptcy court. *In re Leavitt*, 171 F.3d at 1222-23; *In re Marsch*, 36 F.3d 825,  
20 828 (9th Cir. 1994); *Greatwood v. U.S. (In re Greatwood)*, 194 B.R. 637-39 (9th  
21 Cir. BAP 1996), *aff’d*, 120 F.3d 268 (9th Cir. 1997). The *Leavitt* factors will be  
22 applied to Frank and Mary successively.

23 2. The First *Leavitt* Factor: Misrepresentation of Facts in Petition, Unfair  
24 Manipulation of the Bankruptcy Code or Otherwise Filed Chapter 13 Petition in

25  
26 <sup>12</sup>The court also notes that unlike the fundamental right of liberty discussed in  
27 *Addington*, “a debtor has no constitutional or ‘fundamental’ right to a discharge in  
bankruptcy.” See, *Grogan v. Garner*, 498 U.S. 279, 286 (1991) citing *U.S. v. Kras*, 409  
U.S. 434, 445-46 (1973).

1 an Inequitable Manner.

2       Frank Dores - A finding of bad faith supporting dismissal of a bankruptcy  
3 case does not require fraudulent intent by the debtor. *In re Leavitt* 171 F.3d at  
4 1224; *In re Gress*, 257 B.R. 563 (Bankr. D.Mont. 2000). The court in *Gress*  
5 noted:

6           Neither malice nor actual fraud is required to find a lack of good  
7           faith. The bankruptcy judge is not required to have evidence of  
8           debtor illwill directed at creditors, or that debtor was affirmatively  
attempting to violate the law-malfeasance is not a prerequisite to  
bad faith.

9       *Gress* at 568 quoted in *Luxord* at 70-71. See also, *In re Powers*, 135 B.R. 980,  
10 994 (Bankr. C.D. Cal. 1991) ( relying on *In re Waldron*, 785 F.2d 936, 941 (11th  
11 Cir. 1986)).

12           The court had the opportunity to observe Frank's demeanor as a witness.  
13 Frank's testimony was often combative, especially when questioned by opposing  
14 counsel. The court admonished him on many occasions to answer the question  
15 asked and not discuss matters beyond the scope of the question or even on the  
16 same topic. Frank's testimony was contradicted by other witnesses or simply not  
17 credible.

18           For example, Frank's testimony was internally inconsistent on the issue of  
19 him "backing up" the Bunnett computer before it was returned. He testified that  
20 he updated the computer with a Windows 10 program was "inadvertent."<sup>13</sup>  
21 However, he also testified that before updating the computer, he backed up the  
22 files to prevent possible loss, thus contradicts the claim that updating was  
23 "accidental." Then he also stated that updating the computer was something  
24 "everyone did." His testimony also conflicted with that of his wife, Mary Anne,

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26           

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<sup>13</sup>Testimony of Frank Dores. 1-88:22-89:24. There were three days of testimony.  
27 Transcript references will begin with the day of testimony ("1," "2," or "3") followed by  
page and line numbers.

1 with respect to the services performed by Mary Anne for Paros' benefit. Mary  
2 Anne testified that the work for Paros was "not an appraisal." Frank testified that  
3 his wife performed appraisal services for Paros. Frank testified that he did not  
4 work for Agrofin, the subsidiary of Wawasan, or assist them with sales of  
5 product in October and November 2015. Frank later testified and explained he  
6 provided "assistance" and that "you don't close doors."

7 The court finds as fact that the inconsistencies in Frank's testimony  
8 substantially reduced his credibility in testifying on critical issues in the trial on  
9 the Motion. His testimony is not completely credible and was entitled to little  
10 probative weight without corroboration. *In re Taylor*, 514 F.2d, 1370, 1373-74  
11 (9th Cir. 1975).

12 Frank was not candid when he signed his declaration regarding the  
13 adjustment to the chapter 13 Means Test.<sup>14</sup> Frank stated in a written declaration  
14 that "he is on disability and he is not able to work due to symptoms caused by the  
15 stress related to his employment with Bunnett." He also stated that when he does  
16 return to work, he will not be able to work in the same kind of high-stress  
17 environment as before. However, other testimony significantly conflicts with  
18 Frank's statements. Ray Gearhart, a former sales agent for Bunnett, testified that  
19 Frank told him shortly after separating from Bunnett that he was applying to be a  
20 distributor for similar dairy industry nutrition products, including those sold by  
21 OCI and Wawasan. There is also Frank, Ray Gearhart and John Franklin's  
22 aborted negotiations with Natural Soda.

23 Brian D'Ewart who worked for Dewco, another feed product  
24 representative, testified that Frank offered services in trying to help him source  
25 products. Frank introduced Mr. D'Ewart to other suppliers of potassium

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27 <sup>14</sup>Doc. #1.

1 carbonate. Frank also connected the Dewco company with Agrofin. Andy Lott,  
2 a hauler, testified that Frank spoke to him on the phone and told him that he  
3 would be setting up a company, FM Ag, to source product. His communications  
4 included Frank arranging another supplier in the industry, Mission Ag, to “book a  
5 load” with Lott Trucking. Frank also negotiated with Wei K. Yong Su to be a  
6 sales agent for Agrofin and to be paid a commission. Wei Su worked with  
7 Agrofin. These negotiations did not result in an agreement.

8 When confronted with these facts, Frank testified that he either did not  
9 remember or he was “helping friends.” At one moment, Frank testified that  
10 helping his friends was not the same thing as “assistance.” He also testified that  
11 during the period beginning in November of 2015 to an uncertain date, he  
12 blocked cell phone calls. Yet, the record is replete with numerous contacts that  
13 suggest otherwise. While Frank’s memory loss due to stress and the medications  
14 he was taking combating that stress are certainly legitimate, Frank’s actions in  
15 continuing to maintain contact are strongly inconsistent. While the court cannot  
16 make a finding as to the legitimacy of Frank’s claim for disability benefits and  
17 will not, the fact is that his activities, whether or not “anti-competitive” to  
18 Bennett, are not consistent with statements in a declaration relating to Frank’s  
19 ability to contribute income to fund a chapter 13 plan.

20 The court finds as fact that Frank’s declaration dated January 22, 2016,  
21 filed with the court as part of the schedules in this case is, at best misleading and,  
22 at worst, knowingly false.

23 Even after Frank and Mary Anne filed bankruptcy, Frank’s contacts in the  
24 industry continued. Ray Gearheart testified that in March 2016, Frank told him  
25 that several dairymen, all of whom Frank dealt with, shifted their source of inert  
26 fats from Bennett to Wawasan. There is also testimony of post-petition contacts  
27 between Frank and Deb Mize of Mission Ag, Brian D’Ewart of Dewco and

1 others. Ray Gearheart testified that Frank did provide phone numbers for a  
2 prospective customer, he also testified that Frank never helped make any sales for  
3 Mr. Gearheart, who is employed as a salesman for Agrofin.<sup>15</sup>

4 However, Frank's explanation to the court for making these contacts was  
5 either to "help friends" or to arrange for employment "at some future time."  
6 Further, Frank stated that, to him, it was not work because "he did not get paid  
7 for it." Frank justified these contacts by saying these suppliers and customers of  
8 Bunnett first contacted him because they were dissatisfied with Bunnett.  
9 However, there was no testimony that Frank told former customers he was  
10 disconnecting from the business. Andy Lott, the hauler, did testify that Frank  
11 told him he needed to "tend to his (Frank's) health due to stress he had  
12 experienced in the last ten to twelve years." However, even Frank testified that  
13 he did not tell any suppliers or customers that he was not disengaging from the  
14 business, indicating his intention to continue in the same business that had caused  
15 his stress. These contradictory statements and positions further reduce the  
16 credibility of Frank's testimony and declaration regarding his disability.

17 The court finds as fact that even after the filing of the petition, Frank was  
18 continuing to contact or be contacted by customers and suppliers contradicting  
19 his statements in the declaration filed with the petition that once he returned to  
20 work he would not be able to continue in the "high stress" job he had worked in  
21 before.

22 In addition to the inconsistent statements in the declaration, Frank failed to  
23 reveal on the bankruptcy schedules the \$40,000 payment from Wawasan that had  
24 been filtered through Ray and Todd Gearheart and paid to friends and family  
25 members. On this issue, the evolution of the reasons why the payment was not

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27 <sup>15</sup>Ray Gearheart deposition August 23, 2016, 125:17-126:10.  
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1 disclosed calls into question the *bona fides* of the schedules. In a declaration  
2 filed June 21, 2016, in connection with the aborted settlement agreement, Frank  
3 stated that he did not actually receive the \$40,000 but “h[as] been told that they  
4 [sic] were sent to friends and family members to be used for my benefit if I  
5 requested.”<sup>16</sup> Frank stated that since he never had, touched or asked for the  
6 money, it was not disclosed. However, other testimony is contradictory. Ray  
7 Gearheart testified that in early January 2016, he discussed with Frank payments  
8 from Wawasan and possibly sending checks to other people since Frank was  
9 being sued by Bunnett. Ray Gearheart told his son, Todd Gearheart, that they  
10 needed to distance themselves from any transactions with Wawasan, for Frank’s  
11 benefit because Bunnett’s lawyers were “watching them like hawks.” Yet Frank  
12 told Ray Gearheart, who arranged for the funds transfer, the names of the people  
13 who were to receive the monies. Ray Gearheart instructed his son, Todd, who  
14 initially received the funds from Wawasan, to send the money to specific persons.  
15 Todd Gearheart testified that the intent was that the money was to end up in  
16 Frank’s hands. Frank told his brother-in-law, Marcio Relva, in January 2016 that  
17 he (Relva) “might be receiving a check in the mail.” Frank asked Angel  
18 Hernandez, a friend, if someone could send a check to him “in my name.” Frank  
19 told his mother, Mary Dores, January 2016 that someone “may send a check to  
20 her.”<sup>17</sup> The check Mary Dores received was made out to Teresa Miranda, Mary  
21 Dores’ mother, and Frank’s grandmother.<sup>18</sup> Frank says that he disclaimed the  
22 funds and did not consider them his. However, even if the court would construe  
23 a \$40,000 payment from a company that has no real relationship to Frank other

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<sup>16</sup>Doc. #143.

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<sup>17</sup>1-192:5-9.

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<sup>18</sup>1-190:2-191:19.

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1 than as a potential employer or supplier as a gift, that is no excuse not to reveal  
2 that information in the schedules.

3 Equally disconcerting is the amount of time between receipt of the monies  
4 by Frank's family and friends and the disclosure of the information. It was not  
5 until June 2016, nearly six months after the bankruptcy was filed, that the  
6 transaction was disclosed. Still, the transaction is not included in any amended  
7 schedules.

8 The court finds as fact that Frank knew of the impending payments from  
9 Wawasan in January and March 2016 and did not reveal these transfers on his  
10 bankruptcy schedules.

11 Mary Anne Souza Dores - The court observed the demeanor of Mary Anne  
12 as a witness. She was direct and responsive to the questions asked of her by  
13 opposing counsel and her counsel . She did not evade when asked questions  
14 concerning the 2016 money transfers from Wawasan and was cooperative when  
15 reviewing documents. While an earnest witness, the objective facts in this matter  
16 largely refute her version of events.

17 FM Ag Enterprises, the company established by Frank and Mary Anne in  
18 October 2015, was, according to Mary Anne, to be a vehicle for her appraisal  
19 business. However, the formative documents state otherwise. Bunnett has made  
20 much of the fact that FM Ag Enterprises received \$20,000 for a purported  
21 "market survey" prepared by Mary Anne for Paros, a Wawasan subsidiary.  
22 However, Mary Anne has not been able to produce a copy of the document even  
23 though she testified she prepared the report on her own computer. While by itself  
24 suspicious, Bunnett has produced no evidence affirming that Paros/Wawasan did  
25 not receive the report or denied commissioning a report. This is true even though  
26 Bunnett offered the testimony of Wei Su of Agrofin (by deposition) in support of  
27 its case. The court was directed to no testimony confirming Bunnett's theory that

1 the report was a pretense for a payment by Wawasan for Frank's benefit.

2 The court finds as fact Bunnett has not met its burden of proof that the  
3 payment for the market report prepared by Mary Anne for Paros was other than a  
4 payment for services rendered.

5 Mary Anne has maintained that she first learned of the \$40,000 payment  
6 from Wawasan in June 2016 in connection with the aborted settlement of the  
7 issues between Bunnett and the Dores at the time she signed her declaration  
8 concerning that settlement agreement.<sup>19</sup> She also maintains that she did not know  
9 that any of the funds were used for her family's benefit. Mary Dores, Mary  
10 Anne's mother-in-law, is a frequent visitor at Frank and Mary Anne's residence  
11 and assists with the care of Frank and Mary Anne's children. Part of the money  
12 Mary received from Wawasan was used to pay bills for Frank, including private  
13 school tuition and a timeshare.<sup>20</sup> Mary claims that she took the tuition bill and  
14 did not tell anyone and paid the bill.<sup>21</sup> Mary said she had never done that  
15 before.<sup>22</sup> Mary Anne's declaration signed in connection with the settlement says  
16 that she never directly or indirectly received any payment or anything of value  
17 from Todd Gearheart or Wawasan. That is simply false. The payment of their  
18 children's tuition and payment for the timeshare Mary made with those funds  
19 clearly benefitted the family.

20 At the same time, there is no direct evidence that Mary Anne knew of the  
21 payments at the time the schedules were signed or the amendments filed.  
22 However, the schedules clearly state that it is both spouses' responsibility to be  
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24 <sup>19</sup>Doc. #143.

25 <sup>20</sup>1-194:14-195:18.

26 <sup>21</sup>1-196:17-197:6.

27 <sup>22</sup>*Id.*

1 fully candid in providing information in the schedules.

2 In discovery in this case, Mary Anne declined to answer certain deposition  
3 questions on the ground of the marital-communication privilege. The court has  
4 not found authority stating that an adverse inference is warranted where a party  
5 has invoked the marital-communication privilege. However, the same or similar  
6 consequences are at risk if an adverse inference could be drawn from someone  
7 invoking the attorney-client privilege. Like the attorney-client privilege which is  
8 “regarded as of sufficient social importance to justify some sacrifice of the  
9 availability of evidence relevant to the administration of justice.” *Knorr-Bremse*  
10 *Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1344 (Fed.  
11 Cir. 2004) (*en banc*) (citation and internal quotations marks omitted). The  
12 marital-communications privilege [which] protects the marital bond, is  
13 considered to have a value “higher than truth.” *Whitney v. City of Milan*,  
14 *Tennessee* 2014 WL 11411675 (WD Tennessee, February 27, 2014) quoting  
15 *United States v. Brown*, 605 F.2d. 389, 396 (8th Cir. 1979) *cert. denied*, 444 U.S.  
16 972 (1979).

17 The court finds that Bunnett is not entitled to an adverse inference that  
18 Mary Anne discussed with Frank the monies paid or to be paid by Wawasan at  
19 the time the petition was filed because she invoked the marital-communication  
20 privilege

21 Nevertheless, the court takes seriously Mary Anne’s obligation to  
22 independently verify the truth of statements made in the schedules. The court  
23 notes that it is inconsistent with the closeness of the Dores’ family and the  
24 assistance that Mary provided to Frank and Mary Anne that it would not “come  
25 up” in conversation about payments received by Mary from Todd Gearheart or  
26 that Mary used some of those funds to pay Mary Anne’s children’s school tuition.  
27 This inconsistency is further bolstered by the fact that Mary testified that she had

1 not paid bills for Mary Anne and Frank before. This unconventional occurrence  
2 would certainly be the topic of a comment or conversation.

3 Independently, Marcio Relva, Mary Anne's brother-in-law, received  
4 \$5,000 on or about January 27, 2016. Wouldn't this spark a comment or  
5 conversation between Relva and Mary Anne or at least between Mary Anne and  
6 her sister? Finally, Frank was highly compensated by Bunnett before leaving.  
7 The substantial change in the Dores' economic position between September 2015  
8 to January 2016 suggest that both Frank and Mary Anne were aware of their  
9 financial needs and were vitally interested in how those needs would be satisfied.  
10 It is simply not credible that Mary Anne knew nothing of the Wawasan payments.

11 The court notes that Mary Anne and Frank were represented by competent  
12 counsel at the time of the filing of the bankruptcy case and throughout the case.  
13 The Debtors, being represented by an attorney, "can be charged with constructive  
14 knowledge of the law's requirements." *Stallcop v. Kaiser Foundation Hospitals*,  
15 820 F.2d 1044, 1050 (9th Cir. 1987). Even in the unlikely event that Mary Anne  
16 did not know or have reason to know of the assistance of the Wawasan payments,  
17 she and Frank are charged with knowing the requirements of law.

18 The court finds as fact that Mary Anne knew, should have known or had  
19 the means to learn of the Wawasan payments at the time of the filing of the  
20 bankruptcy case and certainly thereafter in time to testify truthfully at the first  
21 meeting of creditors or when amended schedules were filed. The payments were  
22 not disclosed.

23 Based on the above findings of fact, the court finds Frank and Mary Ann  
24 misrepresented facts in their petition, schedules, accompanying declarations and  
25 testimony at the meeting of creditors. The first *Leavitt* factor favors Bunnett.

26 3. The Second *Leavitt* Factor: Debtors' History of Filings and Dismissals.

27 The court has been provided no evidence that either Frank or Mary Anne

1 have filed any previous bankruptcy case. The court therefore finds this factor in  
2 favor of Frank and Mary Anne.

3 4. The Third *Leavitt* Factor: The Debtor's Intention to Defeat State Court  
4 Litigation.

5 Frank Does - At the time the bankruptcy was filed, Frank was embroiled  
6 in litigation with Bunnett over his leaving the companies and allegedly interfering  
7 with their customers and suppliers. A temporary restraining order was issued by  
8 the Texas state court as well as the Texas Federal District Court. During the  
9 pendency of the Federal litigation, the bankruptcy was filed.

10 The impact of this litigation on the decisions Frank made is evidenced in  
11 at least three instances. First, in November 2015, Frank quickly aborted final  
12 negotiations and execution of a sales representative agreement with one of  
13 Bunnett's suppliers, Natural Soda. Ray Gearheart testified that it was his  
14 understanding Frank aborted the negotiations because of his fear of being sued.

15 Second, the structure of the Wawasan payments seem designed to avoid  
16 the effect of the injunction issued by the Federal District Court in Texas. Todd  
17 Gearheart testified that he was told by Ray Gearheart that the payments were  
18 going to be made indirectly because Frank was "hampered by an injunction."

19 Third, Frank initially pursued a worker's compensation claim against  
20 Bunnett for job-related stress. That claim was later withdrawn in favor of a  
21 disability claim which, according to the Gearhearts, was largely litigation  
22 connected. Also, a review of the bankruptcy schedules shows that, other than the  
23 Bunnett litigation, there was no other claim or aggressive creditor action facing  
24 Frank or Mary Anne at the time the bankruptcy was filed.

25 Bad faith exists where the debtor's only purpose is to defeat state court  
26 litigation. *In re Eisen*, 14 F.3d at 470. The evidence strongly suggests that, as to  
27 Frank, his only purpose for filing was to encumber litigation. By the time the

1 bankruptcy was filed the Texas District Court had issued a temporary restraining  
2 order. The Texas state court had issued one earlier. Also, Frank knew that he  
3 had contacted or been contacted by customers or suppliers of Bunnett and was  
4 continuing to maintain those contacts. He told some of those suppliers and  
5 customers that he was looking forward to working with them whether then, or  
6 sometime in the future.

7 The court finds as fact that Frank's primary purpose in filing the  
8 bankruptcy petition was to avoid or defeat the pending litigation against him  
9 prosecuted by Bunnett.

10 Mary Anne Souza Dores - Mary Anne was not named as a defendant in the  
11 Bunnett litigation so the court could not find that defeating state court litigation  
12 was the only purpose Mary Anne had in joining the bankruptcy petition. She was  
13 faced with a substantial loss of income affecting her family and she testified that  
14 she was going to need to substantially increase her own workload in order for her  
15 family to make ends meet. The defense of the Bunnett litigation would certainly  
16 have depleted Frank and Mary Anne's community property. There were many  
17 other motivating factors facing Mary Anne who was not a party to the litigation.  
18 Some of those factors may have also entered into Frank's decision to file the  
19 bankruptcy case. However, the difference is that Frank was a named defendant  
20 and was already subjected to two temporary restraining orders. Mary Anne was  
21 not at the time of the filing of the bankruptcy case.

22 The court finds as fact that defeating state court litigation was not the  
23 primary factor in Mary Anne joining in the bankruptcy petition.

24 5. The Fourth Leavitt Factor: The Presence of Egregious Behavior.

25 Frank Dores - In making a determination of whether egregious behavior is  
26 present, the court considers the debtors' pre-petition conduct as well as post-  
27 petition conduct. *In re Luxford*, 368 B.R. at 74 citing *In re Pickering* , 195 B.R.

1 759, 765 (Bankr. D.Montana 1996), citing *Neufeld v. Freeman*, 794 F.2d 149,  
2 152-53 (4th Cir. 1986); *see also Solomon v. Cosby (In re Solomon)*, 67 F.3d  
3 1128, 1134 (4th Cir. 1995). Egregious behavior, such as concealing information  
4 from the court, violating injunctions, filing unauthorized petitions, hiding or  
5 undervaluing assets, making post-petition payments to pre-petition creditors,  
6 violating non-bankruptcy laws or otherwise demonstrating fraudulent conduct,  
7 without excuse, demonstrates bad faith and prejudices creditors. See *In re*  
8 *Chabot*, 411 B.R. 685, 704-05 (citing *Leavitt*, 171 F.3d at 1223-24) and *In re*  
9 *Cortez*, 349 B.R. 608, 613-14 (Bankr. N.D. Cal. 2006).

10 Pre-petition, Frank negotiated with at least one Bunnett supplier and  
11 almost signed a sales agreement. He also either inadvertently or intentionally  
12 erased data on a company computer before returning it to Bunnett.<sup>23</sup>

13 As set forth in the court's previous findings, Frank knew of the Wawasan  
14 payments, identified those who should receive them and continued to maintain  
15 that he had no knowledge of them and disclaimed them. Those payments  
16 remained hidden until June 2016 when Bunnett discovered them.

17 A false oath may involve a false statement or omission in the debtor's  
18 bankruptcy schedules or statement of financial affairs. *Searles v. Reilly, Chapter*  
19 *7 Trustee (In re Searles)*, 317 B.R. 368, 377 (9th Cir. BAP 2004); *Fogel Legware*  
20 *of Switzerland, Inc. v. Wills (In re Wills)*, 243 B.R. 58 (9th Cir. BAP 1999). A

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22 <sup>23</sup>Bunnett offered the expert testimony of a computer forensics expert, David  
23 Kalat, who opined that Frank's installation of the Windows 10 upgrade was  
24 intentionally done resulting in compromising historical data on "the hard drive" and  
25 Frank eliminated over 1,000 files from the computer. In post-trial submissions, the  
26 Dores argue that Kalat's testimony should not be accepted because he was not "offered"  
27 as an expert. The court notes that no objection was made by the Dores' counsel at the  
time of Mr. Kalat's testimony or request to *voir dire* the witness. Independently, the  
court notes the Federal Rule of Evidence 702 does not require any particular procedure  
for the trial court to follow with respect to expert testimony. See *Metabolife*  
*International Link v. Ornick*, 364 F.3d 832, 843 (9th Cir. 2001); *Kumho Tire Company,*  
*Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999); *First Marblehead Corporation v. House*,  
541 F.3d 36, 41 n.3 (1st Cir. 2008).

1 false oath is complete when it is made. *In re Searles* at 377. "Where the  
2 offending oath is contained in the schedules or required statements, the debtor's  
3 continuing duty to assure the accuracy of such schedules and statements means  
4 that the proper method of correction is a formal amendment of the schedules."  
5 *Id.* No such amendment occurred.

6 The court finds as fact that Frank concealed from the court the Wawasan  
7 payments even though he had knowledge of them and that was egregious.

8 Mary Ann Souza Dores - As set forth above, the court has found that Mary  
9 Anne knew, or had reason to know and the means to find out, about the Wawasan  
10 payments. The court has also found that Bunnett has failed to prove by a  
11 preponderance of the evidence any pre-petition egregious behavior by Mary Anne  
12 Dores. However, the knowing concealment of the Wawasan payments and the  
13 delay in revealing the payments does amount to egregious behavior.

14 Independently, the court is troubled by the testimony of family friend,  
15 Angel Hernandez, who testified that in July 2016, shortly after the filing of the  
16 June declaration, Mary Anne told Angel Hernandez that he could do anything he  
17 wanted with the money he received.<sup>24</sup> Mr. Hernandez' testimony on this subject  
18 has not been refuted. This aggravates the concealment and shows a cavalier  
19 attitude towards Mary Anne's disclosure duties under the bankruptcy law.

20 The court finds as fact that Mary Anne was complicit in concealing the  
21 Wawasan payments from the court and disregarded her disclosure obligations  
22 under the bankruptcy law which was egregious.

23 6. Mitigating Factors.

24 Frank Dores - Frank's stress, which he testified was caused by his  
25 deteriorating relationship with Bunnett, resulted in him being diagnosed with

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27 <sup>24</sup>2-48:23-49:16.  
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1 depression and other disorders. Debtors called an expert, Dr. Howsepian, a well  
2 qualified board certified psychiatrist for over 20 years. After examining Frank in  
3 October 2016, he noted that Frank was suffering from several anxiety induced  
4 disorders, including dissociative disorder, anxiety disorder, panic disorder and  
5 bipolar disorder Type 1. Dr. Howsepian also reviewed various medications  
6 Frank had been taking and determined that Frank was not fabricating memory  
7 loss during the period before the examination. He concluded that Frank had a  
8 loss of memory and a loss of cognitive function. This explains Frank's lack of  
9 recollection of specific events, however makes other testimony about those  
10 events uncontroverted. Dr. Howsepian did not opine about Frank's capacity for  
11 veracity when he signed the schedules and declarations at issue in this case.

12 The fact that approximately \$20,000 of the original \$40,000 of the  
13 Wawasan payments has been returned to Debtors' counsel is another mitigating  
14 factor but does not excuse the failure to disclose the payments.

15 There is no evidence the Debtors have failed to perform their chapter 13  
16 plan thus far indicating that, for now, the Debtors are complying with their  
17 obligations. While not excusing egregious actions surrounding disclosure  
18 requirements, it does suggest that Frank and Mary Anne are attempting to comply  
19 with their obligations under chapter 13. The confirmed plan provides that the  
20 trustee is to review the case annually and the Debtors are to provide income tax  
21 returns in addition to all of Frank's pay stubs. While again not excusing the  
22 failure of the Debtors to comply with disclosure obligations or submitting  
23 misleading documents at the beginning of the case, the court does see this as a  
24 mitigating factor.

25 Mary Anne Souza Dores - As can be discerned from the previous  
26 discussion, Bunnett's case against Mary Anne Dores is simply not as strong as  
27 the case against Frank. In addition to the mitigating factors outlined above, the

1 court is not convinced that Mary Anne's behavior necessarily warrants a  
2 dismissal with prejudice. Mary Anne is not a party to any pending lawsuit  
3 involving Bunnett. The evidence against Mary Anne relating to the pre-petition  
4 actions does not suggest any effort to prejudice Bunnett or any other creditor.

5 Mary Anne's demeanor as a witness shows she was trying to be  
6 cooperative. Frank has been subjected to consistent and unremitting scrutiny  
7 from Bunnett in their ongoing efforts to litigate the claims they believe they have  
8 against Frank.

9 In addition, the aggressive actions by Bunnett has caused Mary Anne and  
10 Frank to incur a large amount of attorney's fees. At the same time, so has  
11 Bunnett. However, Frank and Mary Anne being the Debtors here do not have the  
12 same economic strength as Bunnett. Upon dismissal, Frank will likely be named  
13 in Bunnett's pending litigation in the Northern District of California. However,  
14 the benefit of bankruptcy protection comes with costs. One cost is candid  
15 disclosure of assets.

16 The court finds as fact after weighing the totality of the circumstances that  
17 there is cause to dismiss the bankruptcy case on the grounds of bad faith. The  
18 mitigating factors have been considered by the court in reaching this conclusion.

19 **7. Dismissal is in the Best of the Creditors.**

20 Once cause for dismissal is established, the court must determine if the  
21 case should be converted or dismissed. 11 U.S. C. § 1307(c). The decision is  
22 motivated by an analysis of "whichever is in the best interest of creditors and the  
23 estate." § 1307(c).

24 The court has reviewed the schedules in this matter. Other than the  
25 recovery of approximately \$20,000 which has been turned over to Debtors'  
26 counsel, a conversion of the case to a chapter 7 is not of any benefit to the  
27 creditors. Recovery of the remaining \$20,000 will require prosecution of an

1 adversary proceeding with attendant litigation and collection risks. The Debtors  
2 have exempted most of the equity they have available in any assets. There are a  
3 few timeshare interests which, in the court's experience, do not generate a great  
4 deal of interest in trustees because they often do not result in recovery of  
5 substantial sums for the benefit of creditors. There are vehicles which are  
6 encumbered but if the equity is not exempt in the vehicles, the Debtors would be  
7 able to amend schedules to do so.

8 The overarching rationale for this decision, however, is the substantial  
9 administrative expense which is involved in the case. The Debtors have been  
10 embroiled in the litigation with Bunnett on this Motion for nearly a year. They  
11 have incurred substantial attorney's fees. While a large part of the Dores'  
12 counsel's efforts did not benefit the bankruptcy estate, some claims will be made.  
13 Thus, any "victory" for creditors by way of a dividend would be Pyrrhic, at best.  
14 Therefore, there is no substantial benefit to creditors in converting the case to  
15 chapter 7 and dismissal appears to be the best interest of the creditors and the  
16 estate.

17 **8. Dismissal With Prejudice.**

18 As is clear from the above discussion, the court has analyzed the *Leavitt*  
19 factors as they apply to both debtors in this case. In *Leavitt*, the Ninth Circuit  
20 held a dismissal with prejudice must be coupled with a finding of bad faith based  
21 on egregious conduct. *In re Leavitt*, 171 F.3d at 1224. In other words, dismissal  
22 with prejudice under § 349(a) is not meant to be a remedy for every instance of  
23 debtor misconduct. *Id.*

24 This court has weighed the totality of circumstances, including all  
25 mitigating factors, and is convinced based upon the findings set forth above,  
26 credibility of the witnesses the court has observed, the exhibits, and the  
27 deposition testimony offered by both parties, that the dismissal of Frank's case

1 should be with prejudice. There are numerous instances of egregious conduct  
2 coupled with bad faith. However, the mitigating factors support the dismissal  
3 should be coupled with a bar of limited duration.

4 In contrast, while Mary Anne's case should be dismissed for cause due to  
5 "bad faith," the mitigating factors weigh heavily against a dismissal with  
6 prejudice. While some of Mary Anne's conduct is egregious, the mitigating  
7 factors outweigh any type of bar at this time.

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## CONCLUSION

10 "The Bard" in a dramatic fashion has exposed the consequences of the  
11 human frailty of revenge. Those consequences include the unintended  
12 conclusions to recriminatory plans and schemes that have occurred in this case  
13 with neither side achieving its intended goal. The court hopes that the curtain  
14 falls on this tragedy now.

15 Bunnett's motion to dismiss is granted. Frank Miranda Dores is barred  
16 from filing another bankruptcy case for a period of 180 days from the date the  
17 order dismissing the case is final. Mary Anne Souza Dores is not barred from  
18 refiling. A separate order shall issue.<sup>25</sup>

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Dated: Jun 07, 2017

By the Court

  
René Lastreto II, Judge  
United States Bankruptcy Court

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<sup>25</sup>The above constitutes the court's findings of fact and conclusions of law  
pursuant to FRCP 52 made applicable to bankruptcy contested matters by Rules 9014(c)  
and 7052.

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**Instructions to Clerk of Court**  
Service List - Not Part of Order/Judgment

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The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith to the parties below. The Clerk of Court will send the Order via the BNC or, if checked       , via the U.S. mail.

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Debtor(s), Attorney for the Debtor(s), Bankruptcy Trustee (if appointed in the case), and X Other Persons Specified Below:

8

9

Matthew F. Prewitt, Esq.  
Attorney at Law  
233 South Wacker Drive, Suite 6600  
Chicago, IL 60606

10

11

Michael K. Molzberger, Esq.  
Attorney at Law  
233 South Wacker Drive, Suite 6600  
Chicago, IL 60606

12

13

Justin D. Harris, Esq.  
Attorney at Law  
7110 N. Fresno St., Suite 400  
Fresno, CA 93720

14

15

Office of the U.S. Trustee  
U.S. Courthouse  
2500 Tulare Street, Suite 1401  
Fresno, CA 93721

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